

H.625: An act Relating to Extending the Exemption from Encumbrance on Title of Properties Subject to a Pretransition Stormwater Permit

State Permit and Encumbrance on Title

- Under a Vermont Supreme Court decision called *Hunter Broadcasting v. South Burlington*, the failure of a property owner to obtain or renew a State permit is an encumbrance on title.¹
- An encumbrance on title affects the homeowner's ability to sell a home, most specifically in two ways:
 1. By preventing the homeowner from obtaining title insurance; and
 2. By potentially negatively impacting the value of the property due to the cost of obtaining the required permit.
- Lack of a valid State stormwater permit when and where one is required could result in an encumbrance on title.

Stormwater Permitting History

- The federal Clean Water Act § 303 requires states every three years to review the quality of state waters and determine if they meet state water quality standards.
- In the late 1990's, the state determined that 17 state waters do not meet Vermont water quality standards due to stormwater discharges and runoff.
- Following the designation of the 17 stormwater impaired waters there was considerable litigation regarding how and whether to permit discharges to stormwater impaired waters.
- In 2001, the Water Resources Board (WRB) held that absent an EPA-approved cleanup plan called a TMDL, a discharge would not be permitted if it increased the pollutant load in the water.
- In 2003, the WRB held that ANR's proposed plan of cleaning up stormwater impaired waters under a watershed improvement permit did not meet CWA requirements.
- After the Water Resources Board decisions it was unclear how to permit or renew development permits in stormwater impaired waters was unclear.
- Because of the unclear permit standard and because ANR had failed to renew permits for many subdivisions in impaired waters, hundreds of homeowners were subject to title encumbrances.

¹ This issue is often referred to as a "Bianchi" issue because of a similar Vermont Supreme Court decision in *Bianchi v. Lorenz*, 166 VT. 555 (1997), which held that the failure of a property owner to obtain a municipal land use permit was an encumbrance on title. However, in 1998 and subsequent amendments, the General Assembly enacted 24 V.S.A. § 612, which provides: "Notwithstanding the majority decision in *Bianchi v. Lorenz* (1997), for land development, as defined in 24 V.S.A. § 4303(10), no encumbrance on record title to real estate or effect on marketability shall be created by the failure to obtain or comply with the terms or conditions of any required municipal land use permit as defined in 24 V.S.A. § 4303(11)."

Act 140—The Interim Fix

- In 2004, the General Assembly enacted Act 140 to serve as a bridge between the uncertainty and adoption of TMDL or other cleanup plans for the stormwater impaired waters.
- Act 140 did two things:
 1. Establishment of a permitting process in 10 V.S.A. § 1264a² for development in stormwater-impaired waters.
 - ANR was given authority to adopt specific, technical rules for discharges in stormwater impaired waters.
 - Prior to ANR adopting rules, a discharge permitting process was adopted in 10 VSA 1264a, under which development could obtain discharge permit if it met a net zero discharge standard (i.e. no net increase in the pollutant load)
 2. Enactment of 27 V.S.A. § 613, which provided that failure to obtain a discharge permit in a stormwater impaired water is not an encumbrance on title if certain conditions are met.
 - 27 V.S.A. § 613 and its encumbrance fix only applies to properties subject to a pretransition stormwater discharge permit—a stormwater discharge permit issued by ANR on or before June 30, 2004.
 - For new development in 2004 and after, a discharge permit could be obtained under the Act 140 permit standard or ANR’s stormwater rules. Thus, as encumbrance fix was not necessary for post-2004 development.
- Under Act 140 as enacted, the encumbrance fix was scheduled to sunset September 30, 2007.
 - The General Assembly extended the sunset in 2007 and again in 2012.
- 27 V.S.A. § 613 is now scheduled to sunset June 30, 2016.

The Proposed Permanent Fix

- The Act 140 interim fix was intended to apply only until a cleanup plan was adopted for each of the stormwater impaired waters.
- Originally, the expectation was that each of the stormwater impaired waters would have its own TMDL and implementation plan.
 - However, there were concerns about the significant cost of implementation and administration of individual TMDLs.

² 10 V.S.A. § 1264a subsequently was repealed. 1264a was incorporated in 10 V.S.A. § 1264 or the ANR Stormwater Management Rules.

Urban Watersheds

- In 2012, ANR renewed a Municipal Separate Storm Sewer System (MS4) general permit.
- The 2012 MS4 permit requires municipalities in which an urban stormwater impaired water is located to develop a Flow Restoration Plans (FRP) to implement the stormwater TMDLs.
- The FRPs were required to be developed for each impaired watershed by 2015 years and were required to include the following elements:
 1. an identification of the required controls;
 2. a design and construction schedule;
 3. a financial plan;
 4. a regulatory analysis;
 5. the identification of regulatory assistance; and
 6. identification of any third party implementation.
- The MS4 permit also required all municipalities to identify by October 2015 all expired permits for which the municipality would assume responsibility.
 - However, municipalities have not completed this review.
- ANR expects MS4 municipalities will complete the identification process by June 30, 2017.
- Until the MS4 municipalities assume responsibility for all of the pre-2004 expired permits, there will be property subject to encumbrance in the MS4 watersheds.

Mountain Watersheds

- Some of the stormwater impaired waters are located in mountain watersheds not subject to an MS4 permit.
- Those property owners in the mountain watersheds with expired permit do not have a method of acquiring or renewing their permits.
- ANR proposes to issue a cleanup plan—a Water Quality Remediation Plan (WQRP)—in 2016.
- Once a WQRP is issued, the property owners with expired permits in the mountain watersheds will be required to obtain permits under the plan.
- Until the WQRP is issued and property owners can seek coverage, property in the mountain watersheds will be subject to an encumbrance.

Summary of H.625

Sec. 1. Extension of Sunset of Encumbrance Fix for Pretransition Stormwater Permits

- Extends to June 30, 2017, the provision that there shall be no encumbrance on record title of a property when the property owner failed to obtain, renew, or comply with the terms of a pretransition stormwater discharge permit.
 - A pretransition stormwater permit is a stormwater discharge permit issued by ANR on or before June 30, 2004
- This will prevent encumbrances from attaching to property: 1) in urban watersheds where the municipality has not assumed responsibility under the MS4; and 2) to mountain watersheds prior to adoption of the WQRP.

Sec. 2. 27 V.S.A. § 613.

- Amends a date in 27 V.S.A. § 613 to conform to the extension of the sunset on the encumbrance fix.

Sec. 3. Effective Date

- The act takes effect on passage